

U.S. Application No. 10/803,719, filed March 18, 2004  
Attorney Docket No. 14147US02  
Response to Office Action Made Final dated March 27, 2008  
In Response to Office Action Made Final mailed February 22, 2008

### **REMARKS**

Claims 1-37 are pending. Claims 16-27 are allowed. Claims 1-15 and 28-37 have been cancelled without prejudice. Applicant respectfully reserves the right to pursue, without prejudice, any amended or cancelled subject matter in a continuing or related application. It is believed that the application is condition for allowance.

#### **Allowed Claims 16-27**

Applicant gratefully acknowledges the indication by the Examiner that claims 16-27 have been allowed.

#### **Remaining Claims 1-15 and 28-37**

Claims 1-15 and 28-37 have been cancelled without prejudice. Applicant respectfully reserves the right to pursue, without prejudice, any amended or cancelled subject matter in a continuing or related application.

It is believed that the application is in condition for allowance.

#### **Allegedly Well Known or Obvious: No Supporting Documentary Evidence**

Although claims 1-15 and 28-37 have been cancelled without prejudice and the rejections are moot, Applicant feel obliged to address allegations of what is allegedly known or obvious since the Office Action Made Final mailed February 22, 2008 ("Office Action Made Final") does not provide supporting documentary evidence.

Applicant strongly objects to the summarizing of recited claim elements in some of the rejections as set forth in the Office Action Made Final. On many occasions, instead of addressing each and every element as set forth in the claims, the Office Action Made Final merely attempts to distill the claimed subject matter down to the "gist" or "thrust" of the claimed elements. This is respectfully prohibited under M.P.E.P. § 2141.02 ("Distilling an invention

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down to the ‘gist’ or ‘thrust’ of an invention disregards the requirement of analyzing the subject matter ‘as a whole’”).

With respect to now cancelled claims 4, 5 and 29, the Office Action Made Final alleges, without any supporting documentary evidence, that “inserting the indicator at any field (part) of the header would have been obvious to one skilled in the art since it depend on the system para. 0041”. Office Action Made Final at page 4.

With respect to now cancelled claim 6, the Office Action Made Final alleges, without any supporting documentary evidence, that “inserting the indicator at any field (part) of the header would have been obvious to one skilled in the art since it depend on the system”. Office Action Made Final at page 4.

With respect to now cancelled claim 7, the Office Action Made Final alleges, without any supporting documentary evidence, that “it is well known in the art to use the reserve bit in the header of the packet to carry the control information (indicator)”. Office Action Made Final at page 4.

With respect to now cancelled claims 8 and 30-32, the Office Action Made Final alleges, without any supporting documentary evidence, that “[t]o insert the indicator at any location in the packet would have been obvious to one skilled in the art since it depend on the system”. Office Action Made Final at page 5.

With respect to now cancelled claim 36, the Office Action Made Final alleges, without any supporting documentary evidence, that “using the control information to make decision would have been obvious to one skilled in the art to make the system more reliable and efficient”. Office Action Made Final at page 5.

M.P.E.P. § 2144.03 states that “[w]hile ‘official notice’ may be relied on, these circumstances should be rare when an application is under final rejection”. This is not the case in the present application in which the majority of rejected claims have been rejected without documentary evidence in support.

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M.P.E.P. § 2144.03 also states that “[i]t would not be appropriate for the examiner to take official notice of facts without citing a prior art reference where the facts asserted to be well known are not capable of instant and unquestionable demonstration as being well-known. For example, assertions of technical facts in the areas of esoteric technology or specific at knowledge of the prior art must always be supported by citation to some reference work recognized as standard in the pertinent art.” M.P.E.P. § 2144.03.

The above recited allegations in the Office Action Made Final are not technical facts of instant and unquestionable demonstration as being well-known. For example, inserting an indicator any location in the header or in the packet would be counter, for example, to any standard that required an alleged indicator to be in a preset location. Thus, such technical facts as alleged in the Office Action Made Final cannot be unquestionably demonstrated. Furthermore, since the application deals with an area of esoteric technology, the Examiner must cite “some reference work recognized as standard in the pertinent art”. M.P.E.P. § 2144.03. This has not been done.

Applicant respectfully challenges the conclusory assertions made in the Office Action Made Final without any supporting evidence that the elements recited in dependent claims 4-8, 29-32 and 33-36 are well known or obvious in the art.

Applicant respectfully submits that the Office Action Made Final impermissibly considers the elements of the rejected dependent claims in a vacuum instead of considering the claimed inventions as a whole.

Applicant respectfully submits that the elements recited in claims 2-4, 8, 20-22 and 26 are not well known or obvious in their respective contexts. Applicant respectfully submits that, for example, in the context of the elements as recited in independent claim 1, the elements in dependent claims 4-8 are not well known or obvious. Applicant respectfully submits that, for example, in the context of the elements as recited in independent claim 28, the elements in dependent claims 29-32 are not well known or obvious. Applicant respectfully submits that, for

example, in the context of the elements as recited in independent claim 33, the elements in dependent claim 36 are not well known or obvious.

M.P.E.P. § 2144.03(E) states that “[i]t is never appropriate to rely solely on common knowledge in the art without evidentiary support in the record as the principal evidence upon which a rejection was based.”

Accordingly, Applicant respectfully requests that the Examiner produce references in support of the Examiner’s contention or, if the Examiner is relying upon personal knowledge to support the finding of what is known in the art, then the Examiner must provide an affidavit or declaration setting forth specific factual statements and explanations to support the finding. See, e.g., M.P.E.P. § 2144.03 and 37 C.F.R. § 1.104(d)(2).

### **Conclusion**

Applicant does not necessarily agree or disagree with the Examiner’s characterization of the documents made of record, either alone or in combination, or the Examiner’s characterization of recited claim elements. Furthermore, Applicant respectfully reserves the right to argue the characterization of the documents of record, either alone or in combination, to argue what is allegedly well known, allegedly obvious or allegedly disclosed, or the characterization of the recited claim elements should that need arise in the future.

With respect to the present application, Applicant hereby rescinds any disclaimer of claim scope made in the parent application or any predecessor or related application. The Examiner is advised that any previous disclaimer of claim scope, if any, and the alleged prior art that it was made to allegedly avoid, may need to be revisited. Nor should a disclaimer of claim scope, if any, in the present application be read back into any predecessor or related application.

In view of at least the foregoing, it is respectfully submitted that the present application is in condition for allowance. Should anything remain in order to place the present application in condition for allowance, the Examiner is kindly invited to contact the undersigned at the below-

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listed telephone number.

The Commissioner is hereby authorized to charge any additional fees, to charge any fee deficiencies or to credit any overpayments to the deposit account of McAndrews, Held & Malloy, Account No. 13-0017.

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Date: March 27, 2008

Respectfully submitted,

/Michael T. Cruz/  
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